**Case No. SC86269**

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**IN THE MISSOURI SUPREME COURT**

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**KAREN TRIMBLE, D/B/A A-ADVANCED BAIL BONDS,**

**Respondent/Cross-Appellant**

**v.**

**TREVEILLIAN HEARTFELT and TIMMI ANN PRACNA,**

**Appellant/Cross-Respondent**

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**ON TRANSFER AFTER OPINION OF THE MISSOURI COURT OF APPEALS SOUTHERN DISTRICT**

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# RESPONDENT/CROSS-APPELLANT'S SUBSTITUTE REPLY BRIEF

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**R. Lynn Myers #25827**
**2045 S. Glenstone Ave,**
**Suite 201**
**Springfield, MO 65804**
**(417) 887-7409**
**FAX (417) 877-7948**

**Richard D. Crites #28619**
**2045 S. Glenstone Ave.**
**Suite 201**
**Springfield, MO 65804**
**(417) 887-8351**
**FAX (417) 877-7948**

**ATTORNEYS FOR RESPONDENT/CROSS-APPELLANT**

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CASES

## JURISDICTIONAL STATEMENT

Respondent Trimble hereby adopts the jurisdictional statement set forth in her opening cross-appeal brief filed herein.

## STATEMENT OF FACTS

Respondent Trimble hereby adopts the Statement of Facts set forth in her opening cross-appeal brief herein.

## REPLY CROSS APPEAL

## POINT 1

**THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW STATES THAT A SET OFF IS A COUNTERCLAIM IN THAT THIS COURT IN ITS MANDATE AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON ALL DEFENDANT PRACNA'S COUNTERCLAIMS AND SPECIFICALLY REFUSED TO ORDER A NEW TRIAL FOR DEFENDANT PRACNA ON HER COUNTERCLAIM CONCERNING THE SET OFF.**

Deathrage v. Cleghorn, 115 S.W.3rd 447 (MoApp. 2003)

Trimble v. Pracna, 51 S.W.3d 481 (MoApp., 2001)

Bray v. St. Louis-San Francisco Ry. Co., 259 S.W.2d 132 (Mo.App. 1953)

Tillis v. City of Branson, 975 S.W.2d 949 (Mo.App. 1998)

Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo.App. 1999)

**REPLY CROSS APPEAL**

## POINT 2

**THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW BARS A CLAIM FOR SET OFF MADE MORE THAN 5 YEARS AFTER IT ACCRUES AND IS BARRED BY RES JUDICATA IN THAT THE DEFENDANT PRACNA DID NOT INCLUDE THIS CLAIM FOR SET-OFF IN HER ANSWER UNTIL MORE THAN 5 YEARS FROM IT ACCRUAL, AND THIS COURT AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON DEFENDANT PRACNA'S CLAIM FOR SET-OFF.**

RSMo §516.120

## ARGUMENT

## REPLY CROSS APPEAL

## POINT 1

**THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW STATES THAT A SET OFF IS A COUNTERCLAIM IN THAT THIS COURT IN ITS MANDATE AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON ALL DEFENDANT PRACNA'S COUNTERCLAIMS AND SPECIFICALLY REFUSED TO ORDER A NEW TRIAL FOR DEFENDANT PRACNA ON HER COUNTERCLAIM CONCERNING THE SET OFF.**

Defendant Pracna's new argument appears to be quite ingenious. Now after 8 1/2 years, suddenly she is no longer seeking a set-off but a recoupment. Much of the first appeal dealt with this Defendant's position that she was entitled to some type of money **back as a set-off.** Yet now she claims that position was wrong all the time and now she is entitled to a credit. "A rose by any other name…".

This position still fails to recognize that in the first trial, all of the Defendant Pracna's claims concerning this money were in the form of counterclaims, which she lost! This Court has already looked at the basis of that claim, whether for set-

off or recoupment which is simply a claim for monies had and received. See Trimble v. Pracna, 51 S.W.3rd 481 (MoApp. 2001 Motion for Rehearing).

In addition, the Defendant Pracna now claims that she somehow did plead recoupment as an affirmative defense in the original answer to the First Amended Petition. As can be seen, no claim for recoupment was made in that answer. DEFENDANT'S ANSWER TO COUNT 1 OF PLAINTIFF'S FIRST AMENDED PETITION:

"10. For her first affirmative defense, this defendant states that plaintiff and this defendant agreed that as a condition precedent to any liability of this defendant on the "Bond Indemnity Agreement", plaintiff would secure payment of the bond premium for the bail bonds from defendant Treveillian Heartfelt. Plaintiff failed to collect said premium from defendant Heartfelt and, therefore, the condition precedent to this defendant's liability under the "Bond Indemnity Agreement" was never satisfied.

11. For her second affirmative defense, this defendant states that part of the consideration for this defendant executing the "Bond Indemnity Agreement" was the payment by defendant Treveillian Heartfelt of a bond premium of $32,500.00. Plaintiff never collected said funds from defendant Heartfelt and, therefore, this defendant never received an essential element of consideration relating to her liability under the "Bond Indemnity Agreement".

12. For her third affirmative defense, this defendant states that plaintiff represented to defendant prior to the execution of the "Bond Indemnity Agreement" that plaintiff would collect the bond premium of $32,500.00 from defendant Heartfelt. As a result of said representation, this defendant executed the "Bond Indemnity Agreement", but would not have done so had she known that plaintiff did not or would not collect the premium from defendant Heartfelt. Plaintiff in fact did not collect the premium from defendant Heartfelt. As a result of said representation, which was made negligently or fraudulently by plaintiff, this defendant executed the "Bond Indemnity Agreement". As a result of said misrepresentation, said agreement is not binding and enforceable against this defendant.

13. For her fourth affirmative defense., this defendant states that she is relieved of further performance under the agreement as a result of plaintiff s prior breaches of the agreement and, in particular, her failure to secure payment of the bond premium from defendant Heartfelt.

14. For her fifth affirmative defense, this defendant states that plaintiff's cause of action is barred by accord and satisfaction.

15. For her sixth affirmative defense, this defendant states that she has paid any and all sums due and owing to plaintiff under any alleged agreement between plaintiff and this defendant.

16. For her seventh affirmative defense, this defendant states that Count I of plaintiffs First Amended Petition fails to state a claim upon which relief can be granted.

17. For her eighth affirmative defense, this defendant states that as a result of the failure of plaintiff to collect the premium for the bonds from defendant Heartfelt the risk assumed by this defendant under the "Bond Indemnity Agreement" was substantially increased without her consent and , therefore, this defendant is discharged thereon."

While Defendant Pracna does not discuss the issue of res judicata or collateral estoppel, the Court in Deathrage v. Cleghorn, 115 S.W.3rd 447 (MoApp. 2003) examined these issues at length. This Court stated that:

> "The elements of collateral estoppel are: 1) the issue decided in the prior adjudication mirrors that in the present action; 2) the prior adjudication resulted in a final decision on the merits; 3) the party against whom collateral estoppel may apply participated as a party
> * * *; and 4) the party against whom the doctrine may apply has had a full and fair opportunity to litigate the issue.

Now have these elements been met as it concerns this "set-off or recoupment"? The answer is clearly yes.

Losing on that issue, the Defendant Pracna turns once again to the red herring issue of amended pleadings.

Defendant Pracna now takes the position that even though she lost at trial and in the initial appeal on the issue of the $58,500.00 credit that somehow the Second Amended Petition allows her to revive that issue.

While the Court of Appeals decision in Trimble 2 discusses the amendment to the pleadings after the last mandate, the new issues in that pleading **DID NOT** introduce any new issues concerning the liability of Timmi Pracna under the contract. The cases cited by Defendant Pracna talk about the "law of the case" not applying to new issues in amended pleadings.

**Does the Second Amendment to the pleadings as to the issue of damages change the mandate and opinion of the Court of Appeals from the first appeal?** The answer to this question is no! The Court **must** direct itself to the opinion and mandate of the Court of Appeals for directions to proceed.

The Court in Bray v. St. Louis-San Francisco Ry. Co., 259 S.W.2d 132 (Mo.App. 1953) stated that:

> "'The law of the case' applies where a general principle of law is declared as applicable to the facts of the case. If it is remanded generally all issues are open to consideration on a new trial. * * * * A statement of the law is one thing and a determination of the **issues** tendered in the cause is another thing. **Where a case is reversed and remanded with specific directions to try certain issues only, all other issues are determined on the first appeal. * * * * The first**

**states the 'law of the case'; the second is *res judicata final."***

The Court in Tillis v. City of Branson, 975 S.W.2d 949 (Mo.App. 1998) stated:

> "A mandate is to be read in conjunction with the appellate opinion filed in the case, and the trial court is **required** to follow the directions in conjunction therewith"

The Court in Outcom, Inc. v. City of Lake St. Louis, 996 S.W.2d 571 (Mo.App. 1999) stated:

> "The jurisdiction of the trial court on remand is determined by the mandate and opinion of the appellate court. * * * * A remand with directions limits the trial court to enter judgment in conformity with the mandate. The trial court is without power to modify, alter, amend or otherwise depart from the appellate judgment, and any proceedings contrary to the directions of the mandate are null and void."

In this case the mandate was clear. The Appeals Court remanded this case after the first appeal for a new trial against the Defendant Timmi Pracna on the issue of damages only on Count 1 of the Plaintiff's Petition, the contract action on the bail bond contract. The Court of Appeals specifically denied Defendant Pracna's request to retry the issue of the $58,500.00. Nothing Plaintiff has done in its amendment changes that issue.

Therefore nothing in Plaintiff's amendment changes the decision of the Court of Appeals and it does not reopen the entire case for decision.

The Trial Court should have sustained the Plaintiff’s objection and not allowed Defendant Pracna a credit of $58,500.00 against Plaintiff’s judgment.

## REPLY CROSS APPEAL

## POINT 2

**THE TRIAL COURT ERRED IN AWARDING A SET-OFF OF $58,500 TO THE DEFENDANT PRACNA AGAINST THE JUDGMENT FOR THE PLAINTIFF TRIMBLE ON COUNT 1 BECAUSE MISSOURI LAW BARS A CLAIM FOR SET OFF MADE MORE THAN 5 YEARS AFTER IT ACCRUES AND IS BARRED BY RES JUDICATA IN THAT THE DEFENDANT PRACNA DID NOT INCLUDE THIS CLAIM FOR SET-OFF IN HER ANSWER UNTIL MORE THAN 5 YEARS FROM ITS ACCRUAL, AND THIS COURT AFFIRMED THE JUDGMENT FOR PLAINTIFF KAREN TRIMBLE ON DEFENDANT PRACNA'S CLAIM FOR SET-OFF.**

Missouri law as found in RSMo §516.120, provides that all actions upon contracts, obligations etc., must be brought within 5 years.

In Defendant Pracna's original answer (LF-139), she raised the issue of set-off in her counterclaims, Count I, Count II, and Count IX. However, Defendant Pracna did not raise this issue of set-off or recoupment as an affirmative defense in her answer to Count 1 of the Plaintiff's Petition which was tried in the first trial.

All testimony in this case in the first and second trial indicates that Ms. Pracna had sent Karen Trimble the $58,500 by September 8, 1995, thus accruing any claim she may have had on that date.

It was not until November 29, 2001, after Plaintiff Karen Trimble had received judgment on her behalf on all of Defendant Pracna's counterclaims, that Defendant Pracna for the first time raised a what she now wants to identify as a recoupment as an affirmative defense found in paragraph 21 of Pracna's answer. (LF-67)

In her Response, Defendant Pracna states that Plaintiff in some manner has waived the defense of statute of limitations because Plaintiff did not plead this defense.

The purpose of pleading is to bring to the Court's attention all issues both legal and factual.

The Court has only to examine Plaintiff's Motion to Dismiss and Strike or in the Alternative for Summary Judgment found in the Legal File at page 120 to see that this very issue of the statute of limitations was pleaded to the trial court. Further there is a reply by the Defendant Pracna to this issue at Legal File pages 191 and 192.

Therefore it is again clear that this Court should reverse the trial court and adjust the Plaintiff's Judgment accordingly.

## CONCLUSION

The Respondent, Cross-Appellant, Karen Trimble for the reasons set forth in this Reply Brief, requests that this Court grant the following:

1. Affirm the trial Court's Judgment in all aspects, except to:

    a. Reverse the allowance of a $58,500 set-off to the Defendant Pracna against the judgment for Karen Trimble on Count 1 of her suit against the Defendants Heartfelt and Pracna;

    b. Award to Karen Trimble her costs of the transcript from the first appeal as an expense under the bail bond contract; and

    c. Remand the case to the trial Court to determine a fair and reasonable attorney fee pursuant to the bail bond contract on an hourly basis.

Respectfully submitted:

By:_____
Lynn Myers
MO Bar No. 25827

2045 S. Glenstone Ave., Suite 201
Springfield, MO 65804
(417) 887-7408
FAX (417) 877-7948
Attorney for Respondent/ Cross-Appellant

IN THE MISSOURI SUPREME COURT

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|---|---|---|
| KAREN F. TRIMBLE | ) | |
| Respondent/ | ) | |
| Cross-Appellant, | ) | |
| vs. | ) | Appeal No. SC86269 |
| | ) | |
| TIMMI ANN PRACNA, | ) | |
| Appellant/ | ) | |
| Cross-Respondent. | ) | |

**CERTIFICATE OF COMPLIANCE WITH RULE 84.06, SPECIAL RULE NO. 1 AND CERTIFICATE OF SERVICE**

Pursuant to Rule 84.06(c) and Special Rule No. 1, counsel for Respondent/Cross Appellant certifies that this brief complies with the limitations contained therein. There are 2,476 words in this brief. Counsel for Respondent/Cross Appellant relied on the word count of his word processing system in making this certification.

Pursuant to said Rules, counsel for Respondent/Cross Appellant certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Respondent/Cross Appellant states that Respondent/Cross Appellant's opening brief in the within cause was by him caused to be served, either by hand delivery or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on the 7th day of December, 2004:

10 copies and 1 diskette: Thomas F. Simon, Clerk
Missouri Supreme Court
207 West High St.
Jefferson City, MO 65102

2 copies and 1 diskette: CHARLES B. COWHERD, MBE#27087
1949 East Sunshine, Suite 2-300
Springfield, MO 65804-1605
Office: (417) 862-6726
Fax No.: (417) 862-6948
Fax No.: (312) 606-7777

By:_____
Lynn Myers
MO Bar No. 25827

2045 S. Glenstone Ave., Suite 201
Springfield, MO 65804
(417) 887-7408
FAX (417) 877-7948
Attorney for Respondent/ Cross-Appellant